IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.92 OF 1993

Revansidhhappa Y. Shingare
Occupation : Business,
Residing at Shri Revansiddheshwar
Mandir, Bijapur Road, Solapur. **... Appellant (Orig.Plaintiff)**

Versus

1. **Suresh Ramchandra Tekale**
   Occupation : Business,
   Residing at 376,
   East Mangalwar Peth,
   Solapur.

2. **Chandbi Abdul Bashir Kacchi,**
   Occupation : House-hold work,
   Residing at 19,
   Shukravar Peth,
   Solapur.

3. **Abdul Wahab Abdul Gani Kacchi**
   Occupation Nil,
   Residence as above. **... Respondents (Orig. Defendants)**

Mr. Vineet B. Naik, Advocate for Appellant
Mr. A.V. Anturkar, Advocate for Respondent

CORAM : ***S.R.SATHE,J.***
DATED : ***04th August,2006***

ORAL JUDGEMENT :-

1. Appellant, the original plaintiff in Regular Civil Suit No.1008/1981 has preferred this appeal against the judgement and order passed by the Court of 4th Additional District Judge, Solapur in Civil Appeal

....2/-

No. 92/1993 whereby the judgement and order dismissing the Plaintiffs suit for possession passed by the Court of C.J.D. Solapur in Regular Civil Suit No. 1008/1981 was confirmed and the appeal was dismissed. For the sake of convenience hereafter, the parties shall be referred to as *'Plaintiff'* and *'Defendants'*.

2. The brief facts giving rise to this appeal are as under :-

The suit property bearing municipal No. 376 of which City Survey Number is 3411 situated at Mangalwar Peth, Solapur was initially owned by one Smt. Gaurawwabai Gurubasappa Jamma and others. On 27/11/1980 half portion of the said municipal No. 376 i.e. northern side portion was purchased by plaintiff by virtue of a registered Sale Deed. According to Plaintiff, the suit premises which are shop premises were initially leased out to one Tayyab Abdul Gani Kacchi. He was carrying on grocery shop at the said place. He was from Junagad State. His family members were also there. However, subsequently, some time in the year 1964 or thereabout he alongwith his family went to Karachi and died there and thus, after his death the grocery business which Tayyab Kacchi was

carrying on in the suit premises came to an end.

3. Tayyab Kacchi was residing in house No. 18, Shukravar Peth, Solapur. One woman from Gondhali community was residing with him. However, subsequently she embraced Islam religion and started posing herself as wife of Tayyab Kacchi. She was even naming herself Hafijabi Tayyab Kacchi. She also died in the house No. 18, Shukravar Peth, Solapur i.e. Tayyab Kacchi's house on 31/05/1977. According to Plaintiff, after the death of Tayyab Kacchi, Hafijabi had retained the possession of the suit premises alleging that she is the wife of Tayyab Kacchi. The defendant No.1 is the son of the sister of Hafijabi. He is from Gondhali community. It is alleged by the plaintiff that the defendant No.1 took unauthorized possession of the suit shop and started business in the name of M/s. Abdul Gani Abdul Sattar Kacchi. Subsequently, he also entered into partnership with defendant Nos. 2 and 3. According to Plaintiff, some time in 1977-78, the defendant Nos. 1 to 3 are in illegal unauthorized possession of the suit premises. Hence, Plaintiff issued notice dated 25/08/1981 to defendant and called upon them to hand over the possession.

4. It is plaintiff's case that deceased Hafijabi was not at all any way concerned with the business that was carried out by Tayyab Kacchi in the suit premises and as such even if it is established by the defendant Nos. 1 to 3 that they received the possession of the suit premises and the business from deceased Hafijabi still that would not help them because Hafijabi was also not entitled to transfer her alleged tenancy right to defendant. The Plaintiff alternatively alleged that even if it is held that defendant Nos. 1 to 3 are tenants still then as the suit premises are required by Plaintiff for carrying out his own business, if decree for possession is not passed in his favour greater hardship would be caused to him. Hence on all these grounds the Plaintiff claimed possession of the suit premises.

5. The defendant Nos. 1 to 3 filed their joint Written Statement at Exh-16 and admitted that the suit property was initially owned by Gaurawwabai. They however contended that they have no knowledge as to whether the Plaintiff has purchased the suit premises from Gaurawwabai. According to them, even if there is

such Sale Deed, the same is not legal and valid because the consideration shown in the same is incorrect and inadequate.

6. The defendants further contended that the description of the property given by the Plaintiff is not correct. According to them, the entire suit house bearing No. 376 is in their possession as tenant and even according to Plaintiff, he has purchased only half share in the same. But no actual demarcation has taken place. The remaining half southern portion is purchased by other person and he has not filed the suit for possession against defendant.

7. Without prejudice to the above contentions the defendant further contended that Tayyab Abdul Gani Kacchi took entire suit house on lease about 60 years back and started grocery business in the same. He had three wives and Hafijabi was one of them. When Tayyab Kacchi went to Karachi, he handed over the said grocery business to his wife Hafijabi and grand son Abdul Gani Abdul Sattar Kacchi. Thus, even after the death of Tayyab Kacchi, Hafijabi and Abdul Gani Abdul Sattar Kacchi continued the said business.

....6/-

8. It is the contention of defendant No.1 that since his young age, he was residing in house No.18, Shukravar Peth, alongwith Hafijabi and was also doing business with Tayyab Kacchi and Hafijabi. He being son of the sister of Hafijabi, Tayyab Kacchi and Hafijabi had treated him as member of their family and was doing business alongwith them.

9. The defendant also contended that previous owner of the suit property namely Gaurawwabai Jamma had filed regular Civil Suit No. 511/1963 against Tayyab Kacchi and Abdul Gani Abdul Sattar Kacchi wherein it was alleged that Tayyab Kacchi subleased the suit property to Abdul Gani. However, the said contention was negatived by the Trial Court. The appeal preferred against the said decision by previous owner Gaurawwabai Jamma was also dismissed. Thus, according to defendants as they were doing business with Tayyab Kacchi and then with Hafijabi and defendant Nos.1 and 3 were also residing as members of the family of Tayyab Kacchi and Hafijabi, they acquired tenancy rights in the suit property and it can not be said by the Plaintiff that their possession is illegal and unauthorized. The defendant therefore contended that the suit filed by

the Plaintiff is not legal and correct. They also contended that even as per the will executed by Hafijabi in the year 1972, she has given the suit property to defendant Nos. 1 and 3 and as such also they are having tenancy rights in the suit premises. Lastly, the defendants contended that Plaintiff was in fact aware of all this position but only with a view to obtain the possession, he has filed the present suit by alleging that the defendant's possession is illegal and unauthorized. Hence, on all these grounds, the defendants prayed for the dismissal of the suit.

10. In view of above pleadings the learned Trial Judge framed issues at Exh-23. In order to prove his case, the plaintiff examined himself at Exh-56 and four other witnesses. As against this, the defendant No.1 examined himself at Exh-68. While defendant No.2 examined himself at Exh-75. Both the parties produced certain documents. After considering the entire evidence on record, the learned Trial Judge came to the conclusion that Plaintiff is the owner of the suit property, but he has failed to prove that defendants are in illegal and unauthorized possession of the suit property. On the contrary, the learned Trial Judge held

that the defendants have proved that they are in possession of the suit property as tenants. Naturally, he dismissed the Plaintiff's suit for possession.

11. Being aggrieved by the said order, the Plaintiff filed Civil Appeal in District Court, Solapur. However, the same also came to be dismissed.

12. The above mentioned order of the First Appellate Court is challenged by the Plaintiff in the present second appeal. From the perusal of the record, it appears that this Court admitted the appeal on 09/11/1995. However, no substantial question of law appears to have been framed at the time of admission.

13. In this appeal before me Shri Vineet Naik, learned advocate for the Plaintiff has urged only two points. Firstly, he submitted that both the Courts below have not properly appreciated the evidence on record and have wrongly held that the defendants have become tenants by virtue of the provisions of Section 5 (11)(C) of the Bombay Rents (Hotel and Lodging House Rates Control) Act, 1947 (hereafter referred to as Bombay Rent Act). Secondly, he canvassed before me that

Plaintiff has filed the present suit on the basis of title alleging that the defendants are the trespassers. The defendant denied the ownership of the Plaintiff. However, both the Courts below recorded the concurrent finding that Plaintiff is the owner of the suit property. He therefore submitted that the status of the defendants is that of trespassers and Plaintiff is entitled to get possession. As against this, learned Advocate for the respondent supported the judgement and order passed by the Courts below. He also submitted that the averments in paragraph-6 of the plaint indicate that plaintiff is invoking the jurisdiction under the Bombay Rent Act and at the same time, he is invoking the ordinary jurisdiction of the Civil Court. Thus, according to him, under such circumstances, the suit itself was not maintainable and consequently, the second appeal is also not sustainable. According to him, the remedy for the Plaintiff against the order passed by the District Court was to file Writ Petition and not Second Appeal. He therefore submitted that the Second Appeal be dismissed.

14. The substantial question of law involved in this appeal is whether the possession of the suit

property of the defendants is unauthorized, illegal as alleged by the Plaintiff or whether the defendants are in possession as tenants ? In fact, both the learned advocates have also submitted that the fate of this appeal depends on the above formulated question of law.

15. At the outset, it must be mentioned that it is not in dispute that initially the suit property was owned by Gaurawwabai Jamma. It is true that the defendants have contended that the Plaintiff is not the owner of the suit property and alleged that the Sale Deed executed in favour of Plaintiff is not legal and valid for want of inadequate consideration. However, from the perusal of the evidence, it appears that the defendants have in fact not pressed this point at the time of actual trial. The plaintiff has produced at Exh-53, the Registered Sale Deed executed by Gaurawwabai Jamma and others in favour of Plaintiff. From the perusal of the same, it is crystal clear that northern one-half portion of the suit house bearing No.376 of which City Survey Number is 3411 is purchased by the Plaintiff and thus, he become owner of the suit property. Naturally, both the Courts below have rightly held that suit property is owned by Plaintiff.

16. The main and material question is whether the Plaintiff has proved that the occupation of the suit premises by the defendants is illegal and unauthorized ? While considering this aspect, it is first necessary to see what are the pleadings of the plaintiff. If we peruse the averments in the plaint, it appears that the same are very vague. The Plaintiff has nowhere specifically stated as to when and how the defendants entered the suit property. He has vaguely stated that as per the information received by him, the defendants occupied the suit property about 3-4 years prior to the filing of the suit. Incidently, it must also be noted that plaintiff has deliberately suppressed the fact as to what was the position of the suit property, when he purchased the said property. What information he had received in that behalf from his vendors. As against this, we find that the defendants in their written statement, have come out with a clear case as to when and how they came in possession of the suit property and how they have acquired the tenancy rights. So, after assessing the entire evidence on record and considering the preponderance of probabilities, one has

to find out as to whether Plaintiff's case is proved by him or whether the contentions of the defendant that they have become tenants of the suit property is correct ?

17. From the evidence on record, it is quite evident that admittedly the suit property was initially taken on lease by Tayyab Kacchi and he was doing his grocery business in the same. It is also not in dispute that he had taken entire suit house for that purpose and the present plaintiff is not the owner of the entire suit house. But he has only half share in the same. Having once held that the suit property was initially let out to Tayyab Kacchi, it is necessary to find out as to whether the Plaintiff has adduced cogent and convincing evidence to show as to how the tenancy of Tayyab Kacchi came to an end.

18. From the evidence of Plaintiff and his wife, so also from the evidence of defendant No.1, it is very clear that admittedly Tayyab Kacchi went to Karachi some time in the year 1964 and he died there some time in the year 1967. It is an admitted fact that one woman from Gondhali community was residing with Tayyab Kacchi

and she embraced Islam Religion and was posing herself as the wife of Tayyab Kacchi. Not only that but she was known and recognized as Hafijabi Tayyab Kacchi. It has come in the evidence of defendant that when Tayyab Kacchi was alive and residing in house No.18, Shukravar Peth, Solapur, Hafijabi was also residing there. Not only that but she was also doing business alongwith Tayyab Kacchi in the suit premises. It has come on record that even during the life time of Tayyab Kacchi, one Abdul Gani, grand son of Tayyab Kacchi was residing with Tayyab Kacchi and he was also doing business in the suit premises alongwith Tayyab Kacchi. It is pertinent to note that the defendant has brought on record that the previous owner of the suit property had in fact filed Regular Civil Suit No. 511 of 1963 against Tayyab Kacchi and said Abdul Gani, the father of the present defendant No.3 alleging that Tayyab Kacchi has unlawfully sub-leased the suit property to Abdul Gani. However, the said allegation of then landlord was negatived by the Trial Court and the said finding was confirmed even by the Appellate Court. We find that this important event or circumstance was deliberately suppressed by the Plaintiff. This previous litigation and its result clearly indicates that even

during the life time of Tayyab Kacchi, the father of present defendant No.3 was doing business alongwith Tayyab Kacchi in the suit premises. All this is very evident from the perusal of the judgement in Regular Civil Suit No. 511 of 1963, certified copy of which is produced at Exh-48.

19. The defendant has stated that in his young age, he started residing with Tayyab Kacchi and Hafijabi and was also looking after the business that was carried out by Tayyab Kacchi in the suit premises. It is true that the defendant No.1 is from Gondhali community. However, it must be noted that he was not totally stranger to Tayyab Kacchi and his wife Hafijabi. The defendant No.1 is son of Hafijabi's sister. That is why he started residing with Tayyab Kacchi and taking part in the business of Tayyab Kacchi and Hafijabi. What is more to be noted is that after the death of Tayyab Kacchi, his wife Hafijabi was in fact carrying on the business of grocery in the suit premises. Naturally, both the Courts below have rightly held that Hafijabi had in fact become a tenant of the suit property by virtue of the provisions of section 5(11)(C) of the Bombay Rent Act.

....16/-

20. It must be noted that the defendants have produced at Exh-74, the certificate issued by the Registrar of firms. It is for the year 1978. This document shows that Hafijabi and defendant Nos. 1 to 3 were doing business in the suit premises in partnership. It is the case of the defendant that the deceased Hafijabi executed a will Exh-72 and gave the suit premises to defendant. It is true that tenancy can not be transferred by virtue of such will. However, we find that there is abundant evidence on record which clearly indicates that the suit property was occupied by the defendants alongwith Tayyab Kacchi and thereafter, his wife Hafijabi who was doing business of Tayyab Kacchi. If the defendant Nos. 1 to 3 would not have any legal right to carry on business in the suit premises then certainly, the landlord i.e. plaintiff's vendor would not have kept mum. On the contrary, we find that their only grievance was that Abdul Gani was sub-tenant but that was also negatived. So, it does appear that defendant Nos. 1 to 3 were carrying on business in the suit premises as tenant. There is another very important piece of evidence which goes to show that the Plaintiff has deliberately suppressed the material facts and made false allegations that the

defendants are the trespassers.

21. As pointed by me earlier, the Plaintiff has nowhere specifically averred as to when and how defendants committed trespass. As per the definition of trespass given in the Black's Law Dictionary, 'Trespass' means :-

> *" An unlawful act committed against the person or property of another, especially wrongful entry on another's real property. "*

Here in the instant case, there is sufficient evidence to show that entry of defendant Nos. 1 to 3 in the suit premises was certainly not unauthorized or illegal. On the contrary, it was with the permission and consent of the original tenant. The defendant Nos. 1 to 3 were doing business in the suit premises even with Hafijabi who was the wife of the initial tenant Tayyab Kacchi. So, merely because the defendants could not produce any rent receipts to show that they have paid the rent to Plaintiff, we can not jump to the conclusion that their occupation is illegal and unauthorized and they are the trespassers. It is worth to note that even in the Sale Deed Exh-53 when

Plaintiff purchased the property on 27/11/1980. It is mentioned therein.

> " जागा आज रोजी भाडेक-यांचे रुजू रुजवातीने तुमचे प्रत्यक्ष कब्जात मालकीने दिलेली आहे. "
>
> *(Today, the property is given in your actual possession after attorning the tenant.)*

22. So, this recital in the Sale Deed in my opinion in fact gives death blow to the case of the plaintiff that the defendants are trespassers. It is also pertinent to note that plaintiffs own witness Chandrachud Narayan Petkar Exh-66 who purchased the remaining half portion of the suit property has stated that the original owner Jamma gave possession of suit house to him by introducing the tenant. It has also come on record that Tayyab Kacchi's tenancy was in respect of the entire suit house. So also, the present defendants are in possession of the entire suit house and they are doing business at the said place. What is more to be noted is that above mentioned witness has also clearly admitted that since the date of Sale Deed till he deposed, the same persons are in possession of

the suit house. So, this also clearly means that on the date of execution of Sale Deed in favour of present Plaintiff, defendants were in occupation of the suit property as tenants. The Plaintiff has nowhere specifically stated that when he purchased the property, there were tenants and they were different tenants and not present defendants. On the contrary, as stated by me earlier the plaintiff has deliberately suppressed to make any specific averment pointing out the position of the suit property on the date of purchase. So, under such circumstances, I have absolutely no hesitation to hold that both the courts below after considering the entire evidence in its proper perspective and having regard to the preponderance of probabilities and position of law correctly held that plaintiff has failed to prove that defendants are trespassers or that their occupation is illegal and unauthorized and on the contrary, they are occupying the suit premises as tenants.

23. Shri Vineet Naik, learned Advocate for the Appellant submitted that as Plaintiff is true owner of the property, he has got every right to dispossess or throw the defendants who are the trespasser. For this

proposition, he has placed reliance on a case **Ram Ratan and Others V/s. State of U.P. (1997) 1 SCC 188**. I have carefully gone through the said ruling. The facts of the said case and the facts of the case in hand are quite different. In that case, it is observed :

> *A true owner has every right to dispossess or throw out a trespasser, while the trespasser is in the act of process of trespassing and has not accomplished his possession, but this right is not available to the true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law.*

In the instant case, I have already mentioned above that Plaintiff has failed to prove that defendants are trespassers. In fact, it appears that they are in possession for a long period and Plaintiff is having knowledge about the same even when he

....**21/-**

purchased the property. So the above cited ruling is of no use to present plaintiff.

24. The learned Advocate for the Appellant has also placed reliance on case **East India Hotels Ltd. V/s. Syndicate Bank, 1992 Supp (2) SCC 29**. However the said case is also of no help to the Plaintiff because in the above cited case, suit was filed for recovery of possession under section 6 of the Specific Relief Act, 1963. Such is the not the position in the instant case.

25. There is another aspect of the matter, the defendant's tenancy is in respect of the entire suit house and not only in respect of half portion. So, any way it is a composite tenancy. The same can not be split up and considering this legal point also it can not be said that plaintiff is entitled to get possession of the suit property as claimed. So far as the plaintiffs alternative case that the suit premises are required by him bonafide and reasonably for his business is concerned, the same point is not at all urged before me. Even otherwise, the First Appellate Court has rightly negatived Plaintiff's claim in this behalf.

....**22/-**

26. In view of above, there is no substance in this appeal. Appeal is dismissed with costs.

(S.R.SATHE,J)